

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

To be Argued by:
PHILIP B. ABRAMOWITZ

77-2084

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

LEONARD FAMBO,
Petitioner-Appellant,

v.

HAROLD J. SMITH, Superintendent,
Attica Correctional Facility,
Respondent-Appellee.

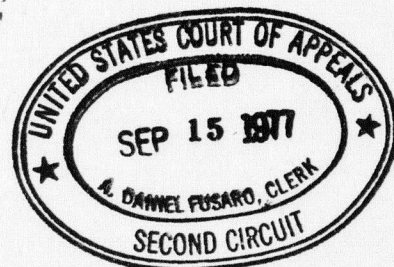
ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANT

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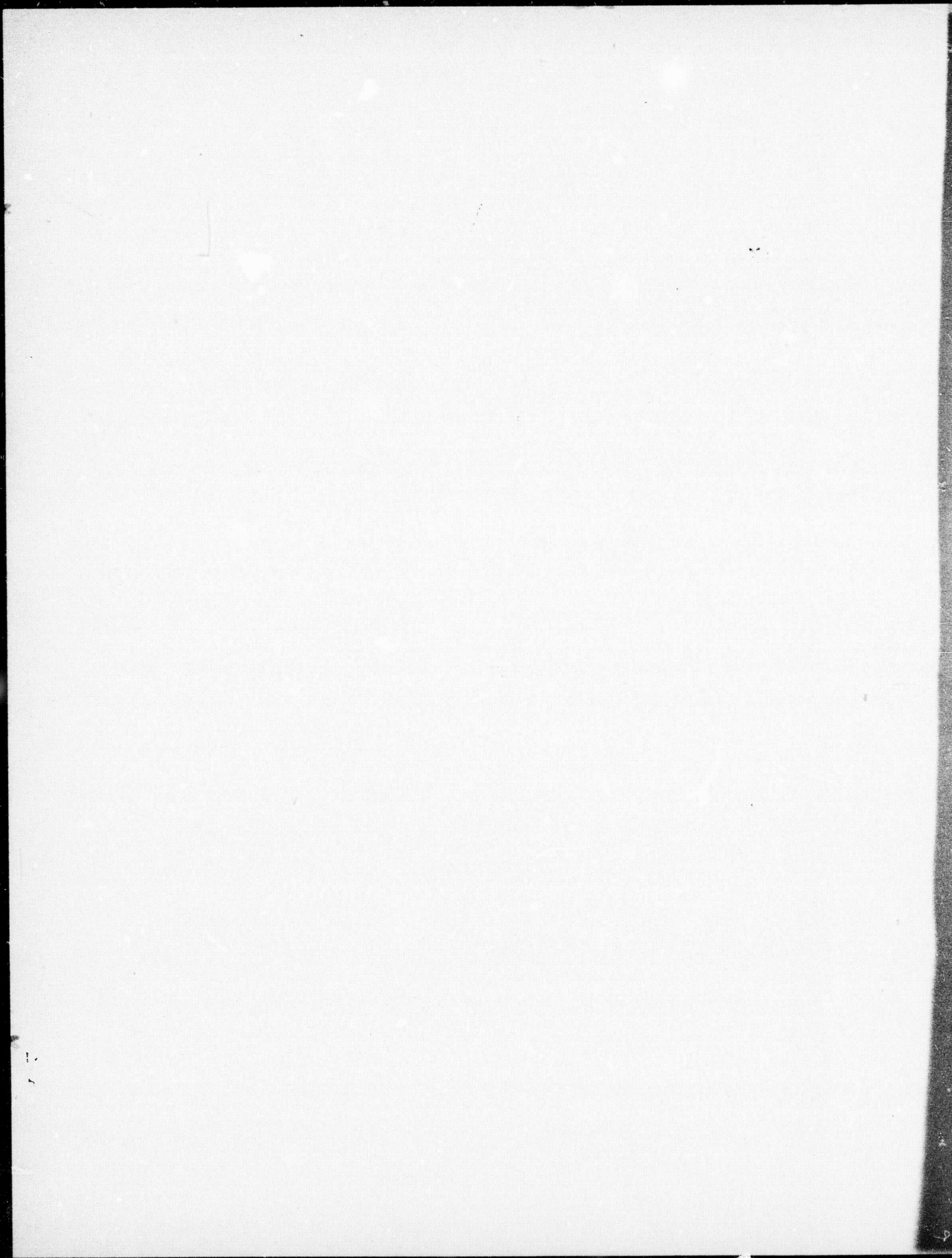


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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

LEONARD FAMBO

Petitioner-Appellant

-vs-

HAROLD J. SMITH, Superintendent
Attica Correctional Facility

Respondent

PRELIMINARY STATEMENT

This is an appeal from an order of the United States District Court for the Western District of New York (John T. Curtin, Ch.J.), dismissing LEONARD FAMBO'S Petition for a Writ of Habeas Corpus. FAMBO was convicted on his plea of guilty to a charge of possession an incendiary device under former New York Penal Law Section 205.05(1). It was subsequently learned that the "stick of dynamite" which the Indictment charged FAMBO with possessing, was in fact a tube containing sawdust; and it was established in this proceeding that the prosecutor knew but did not tell the defense, at the time of the plea negotiations, that the tube did not contain dynamite.

Chief Judge Curtin found that the failure of the prosecutor to disclose to the defense that the "stick of dynamite" was not in fact dynamite, was an "omission of constitutional proportions", properly subjecting the prosecutor to "censure". However, the Court declined to issue the Writ

because the Court found the error to be "harmless"
under Chapman v. California, 386 U.S. 18 (1967).

QUESTION PRESENTED

Whether the failure of the prosecutor to disclose to
the Petitioner that the "dynamite" which Petitioner was charged
with possessing was in fact sawdust, was harmless error.

STATEMENT OF FACTS

Petitioner LEONARD FAMBO and two codefendants were indicted by an Onondaga County, New York, Grand Jury on two counts of possession of dynamite with the intent to use the same unlawfully against the person or property of another in violation of former Section 265.05(7) of the New York Penal Law. Count I charged possession of "a stick of dynamite containing powder and nitroglycerin..." on or about November 29, 1970 and Count II charged "possession of a stick of dynamite containing powder and nitroglycerin..." on or about December 1, 1970. (70)* At that time Section 265.05(7) of the New York Penal Law was a Class B Felony which carried with it possible punishment of twenty-five years in prison.

On October 27, 1972, LEONARD FAMBO pleaded guilty to a reduced charge under Count II of the Indictment (the December 1, 1970 count) of possession of an incendiary device in violation of former Section 265.05(1) of the Penal Law in satisfaction of both counts of the Indictment. (73) At that time Section 265.05(1) was a Class D Felony carrying with it a possible maximum punishment of seven years in prison. MR. FAMBO was promised, however, that his "sentence will not exceed five years if you enter this plea." (73)

The Court did not establish a factual basis for the guilty plea from the Defendant nor did the Court require

*refers to page in Appendix

the District Attorney to lay out on the record the proof that that prosecution would be able to present if the case went to trial. Consequently, the record is absolutely barren of any facts underlying MR. FAMBO'S alleged commission of any criminal acts. (see plea proceedings 72-74)

W o know from the transcript of the plea proceedings (which covers less than three full pages and which could not have taken more than five minutes) that the plea directly resulted from "a pre-trial conference [plea bargaining session] between your attorney, the Court and myself [the District Attorney] " the morning of the plea, and that after the conference MR. FAMBO had "conferred at length with [his counsel" before pleading to the reduced plea which was specifically stated to be "a lesser included offense of the second count of the Indictment [the December 1, 1970 charge] ". (72-74)

On December 27, 1972, Petitioner was sentenced to five years in prison pursuant to the plea which had been bargained for and entered on October 27, 1972.

On March 27, 1974, while still incarcerated as a result of his guilty plea, MR. FAMBO stood trial in Federal Court in Buffalo (at which time he was acquitted of all charges). At that trial a member of the Onondaga County Sheriff's Department, David A. Stevenson, testified under oath that dynamite had been found in a field in Onondaga County, on November 29, 1970, that the dynamite was destroyed, that "on December 1, 1970...

sawdust and spent 38 primer caps" were packed in the tube which had contained the dynamite, and that the tube of sawdust was placed in the field in Onondaga County where the dynamite had been originally found. (43, 44)

The Attorney General has conceded that the tube containing the sawdust is in fact the "stick of dynamite containing powder and nitroglycerin..." (70) which the Indictment alleged that MR. FAMBO had possessed on December 1, 1970 and which resulted in his plea of guilty to the lesser included offense. (7)

It is further undisputed that the prosecutor never told MR. FAMBO or his attorney that the dynamite had been removed from the tube and replaced with sawdust. MR. FAMBO'S attorney, Salten Rodenberg, Esq., submitted an affidavit to the District Court stating that at the plea bargaining conference

"...the District Attorney made sure that it was clearly understood by all the conferees that the District Attorney did in fact have the dynamite which was mentioned in Counts I and II of the Indictment." (49)

The responding affidavit of the District Attorney stated that at the plea bargaining conference "...the factual basis of the Indictment was not discussed in detail and Deponent did not make any specific statements regarding the presence of dynamite." (61)

Judge Curtin resolved this factual dispute without a hearing, stating that

"Based on counsels' affidavits, I find that the Assistant District Attorney did not positively represent to petitioner or his attorney, that he did in fact have the contested dynamite in his possession at the time that the guilty plea was entered."* (18)

In a lengthy opinion, the District Court concluded that

"Even though the Assistant District Attorney's failure to disclose potentially exculpatory evidence was an omission of constitutional proportions and is subject to censure as a bargaining tactic," (32)

the writ would not issue because

"the constitutional error committed in this case can be classified as harmless beyond a reasonable doubt see *Chapman v. California*, 386 U.S. 18 (1967) (28)

*We are at a loss to understand how these conflicting affidavits could have been resolved in favor of the District Attorney without a hearing. In any event, even assuming arguendo that the prosecutor's affidavit is accepted as a finding of fact, in light of the other already undisputed facts, its significance is minimal. The important fact is that the prosecutor failed to disclose that the dynamite was not dynamite, whether or not he made affirmative misrepresentations during the plea-bargaining process. In *U.S. v. Morell* 524 F.2d 550 (2d Cir. 1975) this Court stated:

"If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense." 524 F.2d at 553.

Footnote Continues

The District Court did, however, grant permission to appeal to this Court. (71)

*(cont.) In Agurs v. U.S. 96 S.Ct. 2392, the Supreme Court stated:

"When the prosecutor receives a specific and relevant request, the failure to make any response is seldom, if ever, excusable...but if the evidence is so clearly supportive as a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should arise even where no request is made." 96 S.Ct. at 2399.

ARGUMENT OF LAW

In this Brief, we will not argue extensively over whether the prosecutor committed error in failure to make proper disclosure; rather, we will rely primarily on the analysis contained in the first 25 pages of Judge Curtin's decision where he found error of "constitutional proportions" (32) on the part of the prosecutor. The main part of our argument here will concern whether that failure to disclose is "harmless" error as Judge Curtin found (28). Should the New York State Attorney General wish to argue that the prosecutorial conduct was not error, we will deal more fully with that question in a reply Brief.

POINT I

THE FAILURE OF THE PROSECUTOR TO DISCLOSE TO THE DEFENSE THAT THE "DYNAMITE" WHICH THE DEFENDANT WAS ACCUSED OF POSSESSING WAS ACTUALLY SAWDUST CANNOT BE EXCUSED AS HARMLESS ERROR.

This case, which focuses on the plea bargaining process in criminal cases and on the duty of the prosecutor to disclose favorable material to the defense (Brady material),* must be viewed against the background of several important cases of both this Court and the United States Supreme Court which dealt with those areas of the criminal law.

Santobello v. New York, 404 U.S. 257 (1972) established the validity of "plea bargaining" in our criminal justice system, stating:

"The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called 'plea bargaining,' is an essential component of the administration of justice. Properly administered it is to be encouraged." 404 U.S. at 260.

"Disposition of charges after plea is an essential part of the process of the administration of justice." 404 U.S. at 260-261.

The Chief Justice further stated, however:

"This phase of the process of criminal justice, and the adjudicative element in hearing and accepting a plea of guilty must be attended by safeguards to insure the Defendant what is reasonably due in the circumstances." 404 U.S. at 260.

*Brady v. Maryland, 373 U.S. 83 (1963)

And most important, the Chief Justice warned that the validity of a conviction rendered as a result of a plea "presupposed fairness in securing agreement between an accused and a prosecutor." 404 U.S. at 261.

The rules laid down in Santobello, supra can be considered a natural extension of the decision of the Supreme Court in Brady vs. United States, 397 U.S. 742, where the Court said:

"This mode of conviction [by plea of guilty] is no more foolproof than full trials to the Court or to the jury. Accordingly, we take great precautions against unsound results and we should continue to do so whether the conviction is by plea or by trial." 397 U.S. at 758.

The Court further said that Courts have an obligation to

"satisfy themselves that pleas of guilty are voluntarily and intelligently made by competent defendants with adequate advice of counsel and that there is nothing to question the accuracy or reliability of the defendants' admission that they committed the crimes with which they are charged." 397 U.S. at 758.

In Boykin v. Alabama, 395 U.S. 238 (1969), the Supreme Court, after noting that a plea of guilty was basically the waiver of several fundamental Federal constitutional rights stated that:

"The question of an effective waiver... is of course, governed by Federal standards." 395 U.S. at 243.

The Court further stated that the task of accepting a guilty plea

"demands the utmost solicitude of which Courts are capable in canvassing the matter with the accused to make sure that he has a full understanding of what the plea connotes and of its consequence." 345 U.S. at 243-244.

The most recent case in which the Supreme Court has undertaken to delineate the Brady* doctrine is United States vs. Agurs, 96 S.Ct. 2392, where the Court in stressing Brady's importance in the State and Federal systems said:

"We are not considering the scope of discovery authorized by the Federal Rules of Criminal Procedure, or the wisdom of amending those rules to enlarge the defendants discovery rights. We are dealing with the defendant's right to a fair trial mandated by the due process clause of the Fifth Amendment to the Constitution. Our construction of that clause will apply equally to the comparable clause in the Fourteenth Amendment applicable to trials in state courts." 96 S.Ct. at 2399.

In Agurs the Supreme Court, in discussing the obligation of a prosecutor to disclose evidence to the defense said:

"When the prosecutor receives a specific and relevant request, the

*Brady v. Maryland, 373 U.S. 83 (1963)

failure to make any response is seldom, if ever, excusable...But if the evidence is so clearly supportive of a claim of innocence that it gives the prosecution notice of a duty to produce, that duty should equally arise even where no request is made." 96 S.Ct. at 2399. (emphasis applied)

This Court, in foreshadowing that holding in Agurs, has stated:

"If the prosecutor has intentionally suppressed evidence or ignored evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense." United States v. Morell, 524 F.2d 550, 553 (2d Cir. 1975). (emphasis applied)

See also United States vs. Stofsky, 527 F.2d 237, (2d Cir. 1975) where this Court said:

"The intentional governmental suppression of evidence useful to the defense at trial will mandate a virtual automatic reversal of a criminal conviction." 527 F.2d at 243.

Although Chapman v. California, 386 U.S. 18 which established the "harmless error," doctrine is nowhere mentioned in Agurs, Judge Curtin relied on the principle enunciated in Chapman to conclude that although fundamental constitutional error had been committed, the error was harmless "beyond a reasonable doubt." (28, 32)

Judge Curtin apparently applied Chapman on the basis of the statement in Agurs that:

"If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor...

The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 96 S.Ct. at 2400 and 2401-2402) (emphasis supplied)

It is submitted, however, that even assuming that the harmless error rule is applicable to this case, Judge Curtin incorrectly applied the rule, for as the rule stands, once a defendant shows that error has been committed, the burden rests upon the prosecution to prove "beyond a reasonable doubt" that the error complained of "did not contribute to petitioner's convictions." 386 U.S. at 26. Thus in Chapman, the Supreme Court reversed a criminal conviction because:

"It is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instructions did not contribute to Petitioner's convictions." 386 U.S. at 26.

In this case, however, Judge Curtin after acknowledging that constitutional error was committed of such magnitude that the prosecutor was properly subject to "censure," (32) placed the burden not upon the prosecution to prove that the error was "harmless beyond a reasonable doubt" but upon the criminal defendant to prove that the error was not harmless.

"At this proceeding petitioner has failed to offer any proof that the first count of the Indictment was a baseless charge or to otherwise impugn the Grand Jury decision that there was probable cause for indicting the petitioner for this violation...

While it is clear that petitioner could not have been convicted for violating formal Penal Law Section 265.05(7) on December 1, 1970, the second count of the Indictment, there has been no showing that petitioner might not have been convicted for violating formal Penal Law Section 265.05(7) on November 29, 1970, the first count of the Indictment." (29-30)

It is submitted that this analysis completely and improperly shifts the burden to the defendant which ought as a matter of law to rest on the prosecutor.

As the Supreme Court said in Boykin v. Alabama, 395 U.S. 238,244

"A majority of criminal convictions are obtained after a plea of guilty. If these convictions are to be insulated from attack, the trial court is best advised to conduct an on the record examination of the defendant which should include inter alia, an attempt to satisfy itself that the defendant understands the nature of the charges, his right to a jury trial, the acts sufficient to

constitute the offenses for which he is charged and the permissible range of sentences." 395 U.S. at 244, footnote 7.

In this case, however, there is nothing in the record to establish that the defendant is in fact guilty, and thus the standard of materiality are mandated by Agurs for a finding of harmless error has not been met.

"The proper standard of materiality...is...in the context of the entire record [is there] evidence establishing guilt beyond a reasonable doubt." 96 S.Ct. at 2401-2402.

While we do not argue that a plea proceeding in a state court is required to proceed with the formality required under Rule 11 in Federal Court, surely if the prosecutor does not take the time or the effort to lay out his actual evidence on the record, or if the Judge does not require the Defendant to state specifically and factually what he did and what his intent was in performing certain acts, then the Judge and the prosecutor have risked insuring the integrity of the plea.

"This mode of conviction [by a plea of guilty] is no more foolproof than full trials to the Court or to the jury. Accordingly, we take great precautions against unsound results and we should continue to do so whether the conviction is by plea or by trial." Brady v. U.S. 397 U.S. at 758.

In Brady, the Court further said Judges must be certain that there is nothing to question the accuracy or reliability of the defendants' admissions that they committed the crimes with which they were charged." 397 U.S. at 758.

It is submitted that Judge Curtin also committed error in relying upon the fact that defendant had been indicted by a Grand Jury as any proof of the fact that the defendant was in fact guilty. Is is, of course, black letter law that guilt cannot be presumed from the mere returning of an Indictment. To allow Judge Curtin's analysis to stand would come perilously close to abrogating that important constitutional right and would come perilously close to permitting all guilty pleas to stand simply because there had been an Indictment returned by a Grand Jury.

In any event while Agurs states that

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt," 96 S.Ct. at 2401,

of course, an indictment by a grand jury only establishes probable cause, a burden well under the criminal burden requirement that proof be beyond a reasonable doubt.

In the absence of the Grand Jury transcripts, which were not available to the Petitioner, we could not offer any direct proof that the charge in the first count of the Indictment was baseless. But where it is clearly established that the "dynamite" was in fact sawdust, and the Grand Jury was therefore in fact misled as to the second count (it must be assumed that the Grand Jury would not have indicted for possession of dynamite if it had been informed that the tubes contained only sawdust-- i.e., if the Grand Jury had not heard false testimony that it was in fact dynamite) there is little, if any, basis for Judge Curtin's

presumption that the process leading to Indictment was regular and untainted by prosecutorial misconduct. In any event, the presumption of the regularity of Grand Jury proceedings cannot, by definition, establish that guilt has been proved beyond a reasonable doubt.

But argument over whether the Indictment was tainted or not is somewhat beside the point. The fundamental point is that the entire process of plea bargaining was tainted by the now undisputed misrepresentations that the sawdust was dynamite. See Brady v. U.S., where the Court said

"The standard as to the voluntariness of a guilty plea must...[prohibit]...misrepresentation." 397 U.S. at 765.

Whatever may have been said, implied or left unsaid between the prosecutor and the defense counsel during the plea bargaining session, the prosecutor clearly represented, by the Indictment he stood behind, that he had the dynamite. In addition, the fact that the "dynamite" was sawdust was "so clearly supportive of a claim of innocence that it [gave] the prosecution notice of a duty to produce...even where no request [was] made." Agurs v. United States, 96 S.Ct. at 2399. See also United States v. Stofsky, 527 Fed.2d 237 (2d cir. 1975), where this Court said "The intentional governmental suppression of evidence useful to the defense that trial will mandate a

virtually automatic reversal of a criminal conviction" 527 Fed.2d at 243.

Without the delicate speculation as to the Petitioner's possible guilt of the other charge which was indulged in by the Court below, this conviction must be reversed simply because this Court cannot countenance the prosecutorial misconduct that occurred in this case. It is significant in this regard to note that although in Brady v. United States, supra, the Supreme Court refused to vacate a criminal conviction based on the guilty plea, it specifically stated that it would have been a different case entirely had "the prosecutor threatened prosecution on a charge not justified by the evidence," 397 U.S. at 751, footnote 8. And of course that is exactly what the prosecutor did in the instant case by holding over the Defendant's head a charge carrying a penalty of 25 years which the prosecutor knew was not justified by the evidence.

Thus, the "fairness in securing agreement between the accused and the prosecutor" which is essential to the validity of a conviction by a plea bargain, Santobello v. New York, 404 U.S. at 261, was absent here, and consequently, the conviction may not stand. Equally, the misrepresentation of the prosecutor deprived the Petitioner's plea of the requisite of voluntary and intelligent waiver of known rights necessary for a valid plea, Brady v. United States, 397 U.S. at 755.

CONCLUSION

The conduct of the District Attorney in this case makes a mockery of the high standard of conduct mandated by the Supreme Court in Agurs for both state and federal prosecutors:

"For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always be faithful to his client's overriding interest "that justice be done." He is the servant of the law, the twofold aim of which is that guilt shall not escape or innocent suffer. Berger v. United States, 295 U.S. 678, 688."

United States v. Agurs, 96 S.Ct. at 2401.

This Court should issue a thundering condemnation of the conduct of the prosecutor in this case and grant the Writ requested.

DATED: Buffalo, New York
September 12, 1977

Respectfully submitted,

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RE: Leonard Fambo

vs

Harold J. Smith, Supt. Attica Correctional

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County of Genesee) ss.:
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Patricia A. Lacey

PATRICIA A. LACEY
NOTARY PUBLIC, State of N.Y., Genesee County
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